Appeal No. 03-56498

IN THE

United States Court of Appeals

FOR THE

Ninth Circuit

SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT, *et al.*,
Plaintiffs-Appellants,

v.

KEVIN SHELLEY, *Defendant-Appellee*
– and –
TED COSTA, *Intervenor-Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, CASE NO. CV 03-5715 SVW
HON. STEPHEN V. WILSON, DISTRICT JUDGE

ANSWERING BRIEF OF APPELLEE TED COSTA

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JURISDICTIONAL STATEMENT

Plaintiffs-appellants ("plaintiffs") appeal the district court's denial of their application for a temporary restraining order and preliminary injunction. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

ISSUES ON APPEAL

Plaintiffs sought an injunction from the district court to prevent the defendant Secretary of State from conducting the October 7, 2003 gubernatorial recall election. The California Constitution requires that the recall election be held by the end of that week. Because the recall election is a statewide election, the ballot will also include two voter initiatives. Plaintiffs assert that the use of punch-card voting systems in the October 7 election in six California counties would violate the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act, 42 U.S.C. § 1973. The district court denied plaintiffs' motion. Their appeal raises the following issues:

1. Does the doctrine of res judicata bar this action because plaintiffs prosecuted the same punch-card claims against the same defendant and concluded the action with a consent decree allowing California counties to continue using punch-card systems in elections held until March 2004?

2. Can the Equal Protection Clause bar a state from holding an election within the deadline imposed by its Constitution merely because some counties will vote using a time-tested punch-card system that is slated to be replaced in five months with newer, but not indisputably better, voting technology?

3. Did the district court err in finding no violation of the Voting Rights Act, when plaintiffs offered no more than a disputed statistical correlation between allegedly uncounted votes and the number of minority

voters in punch-card precincts, no evidence tying this disparate impact to race, and no evidence showing that punch-card systems handicap or impede minority groups in California from achieving full participation in the State's political process?

4. Did the district court abuse its discretion in finding that the balance of equities tipped decidedly against enjoining the California gubernatorial recall election for five months beyond its constitutional deadline, when the effect of an injunction would be to disenfranchise millions of voters including nearly 1.7 million recall petition signers, to freeze in office a Governor who a majority of voters reportedly wish to turn out, and to leave California effectively leaderless for an additional five months at a time when the State is facing unprecedented challenges?

INTRODUCTION

Plaintiffs ask this Court to do what the California Supreme Court unanimously declined to do, what the district court properly refused to do, and what no federal court has ever done—to halt an impending election concerning the state's highest elected official simply because some voters will cast their votes on punch-card ballots as they have done for the past forty years. The U.S. Supreme Court has cautioned time and again against judicial interference with even routine state elections. The election plaintiffs seek to block is anything but routine.

Over one and one-half million Californians have signed petitions attesting to a loss of confidence in their Governor, and a majority report that they want him recalled. Exercising a century-old constitutional prerogative of the People, Californians in overwhelming numbers have called for a referendum on the Governor's leadership and, quite likely, the selection of a successor. The right of citizens to control who governs them, pursuant to procedures they have established for that purpose, is fundamental. This right is not unique to Californians; eighteen states afford a right of recall "founded upon the most fundamental principle of our constitutional system"—that "the people may reserve the power to change their representatives at will," *Citizens Comm. to Recall Rizzo v. Bd. of Elections*, 367 A.2d 232, 274-75 (Pa. 1976), and may claim the power to remove those "whom the electors do not want to remain in office," *Groditsky v. Pinckney*, 661 P.2d 279, 283 (Colo. 1983).

When, as here, a crisis of confidence regarding the State's highest elected official has arisen, the "interest of the people in an expeditious recall procedure is fundamental." *Janovich v. Herron*, 592 P.2d 1096, 1102 (Wash. 1979) (emphasis added); *see also Gage v. Jordan*, 23 Cal.2d

794, 799 (1944). Because recall is an important expression of "the people's most basic right of self-governance," any interference with that right requires "strong justification." *Pederson v. Moser*, 662 P.2d 866, 869 (Wash. 1983).

Here there is none. Plaintiffs profess that the election must be stopped lest some 40,000 voters run the risk that punch-card error will prevent their votes from counting. But they failed to convince the district court of even this essential premise. And with good reason. For four decades, Californians have uneventfully elected their leaders, including their current Governor twice, using punch-cards ballots. In the twenty years since the State promulgated a uniform set of rules for what constitutes a punch-card "vote," not a single election has hinged on a hanging chad. Nor can plaintiffs show that punch-card systems are more error-prone than the systems replacing them. Plaintiffs' comparisons rely on measures of residual ballots—*i.e.*, those not counted because the voter either selected no candidate (an under-vote) or more than one (an over-vote). Because touch-screen and precinct-level optical scan systems do not permit (or strongly discourage) residual votes, they generally have a lower residual rate than punch-card systems. But this just proves that punch-cards permit under-voting and over-voting, which studies show voters intentionally do in significant numbers, not that the systems fail to accurately capture voter intent.

Even assuming greater fallibility of punch-cards systems, the district court was well within its discretion to conclude, as it did, that plaintiffs had failed to show a probability of success on the merits, in part because their suit is barred by *res judicata*. This is the second lawsuit plaintiffs have filed against the same party, asserting the same claim and seeking the same

relief. Having settled the first with a consent judgment they negotiated with the State just two years ago, plaintiffs are not entitled to commence a second. Principles of *res judicata* do not yield simply because plaintiffs say they did not anticipate a statewide recall election when they made their deal. A settling party accepts the risk that circumstances may later arise making the settlement less favorable than it appeared when made. And they knew the risk: their deal contemplated (and permitted) at least one and perhaps two statewide elections before punch-cards were retired.

Moreover, the district court correctly found that plaintiffs would likely lose on their two substantive claims. The Equal Protection Clause does not require election perfection. The Supreme Court has repeatedly held, as recently as *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000), that different locales are free to use different rules, procedures and voting machines, even if it results in deviations from mathematical equality. Equal protection requires only that election officials make an "honest and good faith effort" to achieve "substantial equality," so that "as nearly as is practicable one man's vote … is to be worth as much as another's." *Reynolds v. Sims*, 377 U.S. 533, 558-59, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964) (emphasis added). Punch-card systems achieve substantial equality. But more importantly, Los Angeles and other punch-card counties cannot practicably upgrade their systems by October 7, 2003, as the district court determined in the earlier punch-card litigation, and they long-ago scheduled a March 2004 roll-out of next generation equipment to comport with the deadline that plaintiffs had agreed to. Since the Constitution does not require a locality to utilize any particular voting system, equal protection cannot be used to justify a federally-imposed moratorium on all state elections until a "best" system has been deployed.

Plaintiffs' Voting Rights Act claim is equally flawed. Section 2 bars voting practices that result in racial discrimination. A section 2 plaintiff must therefore show, from a consideration of all relevant circumstances, that the voting practice handicaps a minority group from achieving full participation in the political process, not just that the practice disproportionately impacts minority group members. Accordingly, this and other circuit courts have repeatedly held that "a bare statistical showing [that a facially neutral practice has a] disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry.'" *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). Because that is all the plaintiffs' offered the court below, it was compelled to conclude, as it did, that plaintiffs failed to carry their burden of proving a likelihood of success.

Even had plaintiffs presented a less anemic case on the merits, given the enormity of the equities favoring a timely recall election, the decision not to enjoin it was well within the district court's discretion and certainly not a "clear error in judgment." State officials did not schedule the recall election for their convenience. For sound policy reasons, the California Constitution requires that a recall be quickly placed before the electorate—between sixty and eighty days after the Secretary of State certifies that sufficient signatures have been gathered. Cal. Const., Art. II, § 15(a). Given the grave problems confronting California, its citizens are entitled to a full-time Governor, not one whose attention will be focused for an additional five months on keeping his job.

Moreover, the rights of <u>all</u> voters must be considered. If plaintiffs' statistics are correct, punch-cards imperil the votes of at most a half of one percent of those who can be expected to participate in the recall election.

An injunction, on the other hand, will disenfranchise the remaining 7.5 million likely Californian voters, and suspend their right to vote until Los Angeles and other punch-card counties adopt and deploy a voting system more to plaintiffs' liking. An injunction would freeze in office a Governor who, according to recent polls, a majority of Californians wish to remove. Surely, only a grave and inexcusable constitutional violation could justify a federal court placing itself in the path of a prompt and orderly resolution of a state political crisis such as the one Californians find themselves in today. The district court was amply justified in finding no such violation here, and its refusal to thwart the election should be upheld.

STATEMENT OF THE CASE

Plaintiffs filed this lawsuit on August 7, 2003 against Kevin Shelley, in his official capacity as California Secretary of State, to prevent the California gubernatorial recall election from taking place on October 7, a date mandated by the State Constitution. On August 14, the district court granted Mr. Costa leave to file an *amicus curiae* brief in opposition to plaintiffs' motion, and on August 18 granted his motion for leave to intervene to defend the recall right.

On August 20, the district court denied plaintiffs' application for a temporary restraining order and motion for a preliminary injunction to enjoin the October 7 election. ER at 199.[1]

Plaintiffs filed a notice of appeal on August 26, 2003. ER at 227.

[1] Citations to plaintiffs' one-volume Excerpts of Record are in the form: "ER [page]." Citations to Appellee Ted Costa's two-volume Supplemental Excerpts of Record are in the form: " [vol.] SER [page]" with identifying information in a parenthetical. Citations to Mr. Costa's Request for Judicial Notice are in the form: "Req. Jud. Not. Ex. __."

STATEMENT OF FACTS

A. The Recall Petition and Related Litigation

On February 1, 2003, a political outsider composed a one-page petition that has shaken California's leadership to its core. Intervenor Ted Costa, a 62-year-old Sacramento farmer disillusioned with the Governor's practice of soliciting contributions from people doing business with the State,[2] officially launched the recall on March 25, 2003, when he obtained Secretary Shelley's approval and began circulating it. Although needing only 897,158 valid signatures of eligible voters by September 2, by July recall proponents had gathered nearly 1.7 million signatures of which election officials verified more than 1.3 million. Secretary Shelley then certified the election on July 23. As required by Article 2, Section 15(a) of the California Constitution, the Lieutenant Governor scheduled the recall vote for October 7, at the outside edge of the sixty- to eighty-day election window the Constitution requires when the State's leadership is in doubt.

This lawsuit, one of eleven seeking to block or significantly alter the rules governing the recall election, followed on the heels of a similar proceeding instituted by Governor Davis.[3] In a mandate petition he filed directly with the California Supreme Court on August 4, Governor Davis

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[2] *See* Peter Nicholas and Jeffery Rabin, *Target of Anger*, L.A. Times, Aug. 31, 2003, A2, reprinted at http://www.latimes.com/news/politics/la-me-case31aug31004417,1,6862793.story

[3] Mr. Costa requests the Court take judicial notice of this petition and the California Supreme Court's denial of it. *See* Request for Judicial Notice, filed contemporaneously. In addition to *Davis v. Shelley* and this lawsuit, the following proceedings have been filed to block the election: *Salazar v. Monterey County* (03-CV-3584), *Oliverez v. State of California* (03-CV-3658), *Gallegos v. State of California* (03-CV-6157), *Partnoy v. Shelley* (03-CV-1460), *Burton (Mark) v. Shelley* (S117834), *Frankel v. Shelley* (S117770), *Byrnes v. Bustamante* (S117832), *Eisenberg v. Shelley* (S117763), and *Robins v. Shelley* (S117661). Each has been, or is on its way to being, resolved in favor of the election going forward.

charged that because of the planned use of punch-card voting in Los Angeles County, "voters in Los Angeles will face … a greater chance of errors in their ballot, than will voters in other counties" (Req. Jud. Not. Ex. 1, at 1), and he supported his equal protection and right to vote claims with an earlier version of the same declaration of Berkeley professor Henry E. Brady submitted by plaintiffs to the court below. On August 7, 2003, a unanimous Supreme Court denied the petition. Plaintiffs commenced this action later the same day.

B. The Common Cause Lawsuit

This is not plaintiffs' first punch-card lawsuit. Following the 2000 presidential election and the disrepute into which Florida's punch-card presidential balloting fell, the two original plaintiffs below, [4] joined by Common Cause, sued then Secretary of State Jones in April 2001 seeking to compel the State to decertify the use of punch-card voting systems in California. *See Common Cause v. Jones* 213 F. Supp. 2d 1106 (C.D. Cal. 2001).[5] Bowing to political pressure, Secretary Jones decertified punch-cards effective July 1, 2005, but the *Common Cause* plaintiffs wanted their use ended sooner.[6] Because Secretary Jones could not defend a voting

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[4] Plaintiffs amended to add the NAACP as a party, but concede that the addition has no significance with respect to any contested issue.

[5] Under state law, the Secretary must certify those voting systems approved for use in California and can decertify those that are "defective, obsolete, or otherwise unacceptable." Elections Code § 19222. Counties are free to choose from among any of the approved voting systems.

[6] Plaintiffs incorrectly insinuate that the Secretary of State decertified punch-card voting machines because they were "defective." Pls.' Br. at 2. Secretary of State Jones made no such finding when, under pressure following the adverse publicity from Florida, he agreed to decertify punch-card machines, originally beginning in 2007. Secretary Jones carefully avoided saying they were unreliable. Rather, he analogized them to typewriters, which "worked well for many years but are now obsolete in the world of the personal computer." 2 SER 389.

system he had already decertified, the issue in *Common Cause* reduced to determining the earliest date when California counties could practicably transition to alternative voting systems. *See* SER 501-02. The court below, to which the *Common Cause* case had also been assigned, found that to be March 1, 2004, *see id.*, 2002 WL 1766436 at *3, and entered a final judgment from which no one appealed. 2 SER 492.

Aside from allegations concerning the impending recall election, the complaint here is nearly a verbatim copy of the *Common Cause* complaint. Like *Common Cause*, this action turns on the allegation that punch-card systems fail to record voter choices more frequently than new technologies, principally touch-screen systems (which function much like automated tellers) and optical scan systems (which utilize optically scanned paper ballots that voters mark by filling in a bubble or completing an arrow).[7] *Compare* 2 SER 456-57 (¶ 5) *with* 2 SER 474 (¶ 5). Like *Common Cause*, the principal evidence of the unreliability of punch-cards is a higher rate of "residual" ballots, a euphemism for ballots that are not counted because they reflect no choice for any candidate (referred to as an "under-vote") or a choice of two or more when only one is permitted (referred to as an "over-vote"). Like *Common Cause*, the complaint charges that the higher residual rates for punch-card systems than newer technologies establishes a greater likelihood of a vote being lost in a punch-card county than in a county using touch-screens or optically scanned ballots. *Compare* 2 SER 463-64 (¶ 23) *with* 2 SER 486 (¶ 32). Further, as they did in *Common Cause*, plaintiffs allege that punch-cards discriminate against minority voters both because they are used predominantly in more populous counties

[7] Touch-screen systems are sometimes referred to in the literature as "Direct Recording Entry" or "DRE" systems. 1 SER 8 (Hawkins ¶ 13).

where minorities tend to live in greater numbers and because punch-cards intrinsically tend to lose more minority votes than white votes. *Compare* 2 SER 64 (¶¶ 24 & 25) *with* 2 SER 487-88 (¶ 37 & 38).

C. Accuracy of Punch-Card Voting Systems

Professional election administrators disagree with plaintiffs' underlying premise that punch-card voting systems "lose" more votes than newer technologies. Four California Registrars of Voters, with over sixty years of combined experience conducting hundreds of punch-card elections, submitted affidavit testimony that punch-card systems are a sound, reliable way of recording and tabulating voter choices.[8] Indeed, one testified below that there has not been "a single California election … in which an appreciable number of undecipherable punch-card ballots remained after a recount such as to call into question even the closest of elections." 1 SER 8 (¶ 12); *see id.* 17.

This is not Florida, where in 2000 human error was shifted to a mechanical device, leading to what the Los Angeles Registrar has called "a hysterical overreaction" against punch-card systems. 1 SER 79 (McCormack). Unlike Florida, punch-card voting devices in California are assiduously maintained, utilized by voting officials and an electorate well aware of how they need to be handled (*id.* 6, 8, (Hawkins ¶¶ 7-8 & 12); 17-18 (Wharff ¶ 4)), and, in close cases, subject to manual counts that are governed by forty pages of uniform standards that set clear and objective criteria on how voter intent is to be discerned. *Id.* 88-142.[9] Indeed, when

[8] They are Ernest R. Hawkins (Sacramento), Conny McCormack (Los Angeles), Marsha Wharff (Mendocino), and Jill LaVine (Sacramento).

[9] After the 2000 election, Congress studied various voting systems. In the 2002 Help America Vote Act, Congress determined that there was no reason to compel election precincts "to change to a different kind of voting system" as long as the federal standards could be met. H. Rpt. 107-730,

(footnote continues on next page)

punch-card votes are re-tabulated by hand in California, manual counts invariably agree with machine counts. *Id.* at 6 (Hawkins ¶ 6).

Moreover, newer voting technologies have their own shortcomings. According to a former Registrar who has consulted with state, federal, and private groups on voting technology, those systems are not the solution for every locality. Optical scan systems can misread ballots even more frequently than punch-cards. Stray marks can be mistaken for votes, and off-center markings intended as votes can be ignored, depending on the card-reader sensitivity settings the voting official selects. 1 SER 9 (¶ 15). As another Registrar explained, punch-cards are more objective: "either there is a hole or there's not." *Id.* 18-19 (Wharff). There is a place for punch-card systems, as the prestigious National Commission on Election Reform determined when it pointed to Los Angeles as an example of a large, ethnically diverse county "where punch cards make much more sense than optical scanners." 2 SER 303.

Touch-screens, too, offer a mixed bag of advantages and disadvantages. While they may be easy to use, in some studies they rank poorly on plaintiffs' self-proclaimed test for accuracy—*i.e.*, the number of residual ballots they generate (*see* 1 SER 9-10); they produce no voter-verified paper audit trail to permit a post-election recount; and they are

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"Help America Vote Act of 2002" (Oct. 8, 2002), p. 74. Congress further concluded that states may continue to use punch-card voting systems as long as there is "a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes," and there are "instructions on how to correct the ballot before it is cast and counted." 42 U.S.C. § 15481(a)(1)(B). In authorizing punch-card voting for federal elections, Congress reaffirmed the importance of "flexibility, so that local authorities can tailor their procedures to meet the demands of disparate and unique communities." H. Rpt. 107-329, p. 32. The Help America Vote Act refutes plaintiffs' claim that punch-card systems are "discredited," "defective," or "obsolete." Pls.' Br. at 2.

more readily compromised and prone to failure. *Id*. 10. When touch-screens were rolled out in Florida in 2002, tens of thousands of votes were lost during the several hours that it took to get them up and running. *Id.* 247. As Sacramento's former Registrar put it, "The choice of the type of voting device to be used is thus a delicate balance of many competing factors. There is no 'one size fits all,' nor is there any reason to banish any of the venerable technologies, including punch-cards." *Id*. 10 (¶ 18).[10] Not one election professional has contradicted him.

D. Plaintiffs' Statistics Do Not Prove That Punch-Card Systems Are Error-Prone

Instead of opinions borne of first-hand experience conducting punch-card elections, plaintiffs served up a dizzying array of numbers for the district court, all designed by Professor Brady to show that punch-card systems generate more uncounted votes than competing technologies. But the district court remained unconvinced. It had ample reason to question Dr. Brady's evidence.

In the first place, Dr. Brady's statistical benchmark—residual ballots—is not a measure of machine error at all. 1 SER 7 (Hawkins ¶ 10); 84-85 (LaVine ¶¶ 7 & 8); 46 (Caltech/MIT). Many voters simply abstain from voting in particular contests, and others register vote-protests by casting votes for competing candidates or positions. *Id.* 7 (Hawkins ¶ 10); 48 (Caltech/MIT). This is apparent from looking at the residual rates in contests appearing on the same ballot. Caltech's Professor Jonathan Katz in declaration testimony submitted below studied seven L.A. County ballot

[10] The Election Center, an organization of election administration professionals, agrees: "With no voting system possessing, or likely to acquire, a clear claim to the title 'Best,' it is better to maintain diversity and competition as a means of promoting innovation and continued improvement in voting system technology." 2 SER 432.

measures appearing on the 2002 ballot. He found that the residual rate ranged from 8.4% at the low end to almost twice that at the high end. 1 SER 22-23 (¶ 12). A Nevada study of the 2000 presidential election showed deliberate abstentions of 2% of the votes cast (*id.* 35-36 (Katz ¶¶ 22 & 23)), roughly the same as the 2.23% California punch-card residual rate that year, which Dr. Brady calls "machine error." ER 164 (¶ 18). And there is reason to believe that deliberate abstentions are even more prevalent among minority group members, who tend to abstain from voting for an office for which a member of their group is not a candidate. 1 SER 35 (Herron ¶ 21); see *id.* 23 (Katz ¶¶ 14 & 15).

Moreover, even if residual ballots measure machine error, plaintiffs failed to prove the unreliability of punch-card systems. True, one can compare the residual vote rate of punch-card balloting with the rates for precinct-count optical scan voting systems and touch screens, and the new technologies do better by about a percentage point. ER 164 (Brady ¶ 18). But as Professor Herron explained, the comparison proves little because optical scanning systems and touch-screens generate warnings at the polling place that effectively force voters to "fix" under-votes and over-votes, even if that is how the voter would otherwise prefer to vote. 1 SER 31-32 (¶¶ 10 & 11); *id*. 8-9 (Hawkins ¶ 13).[11] When this is taken into account, the supposed superiority of newer technologies over punch-cards vanishes.[12]

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[11] The other flaw in plaintiffs' showing is that it does not take into account the possible existence of confounding factors common to both the use of punch-card systems and higher residual rates, such as their use in larger counties or by minority groups, whose under-votes can be disproportionately higher. 1 SER 25 (Katz ¶ 20).

[12] For example, Dr. Brady conceded that in one study punch-card residual rates were no different than for centrally-read optically scanned ballots which, unlike precinct-level scanning done in the voter's presence, does not

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Plaintiffs also tendered evidence that counties that migrate from punch-cards to other technologies experience a drop in their residual rate. ER 167 (Brady ¶¶ 26 & 27). But this too is explained by the fact that touch-screens and precinct-level optical scan systems discourage deliberate over- and under-voting. Moreover, as Professor Katz explained, while this analysis controls for differences in the characteristics of the populations being compared (they are the same), it does not control for differences in the election, which can greatly affect the residual rate. 1 SER 26-27 (Katz ¶ 23). The examples that Dr. Brady cites to show a residual rate reduction when voting systems are changed from one election to the next all suffer from this flaw.[13] Dr. Brady had no answer.[14]

E. March 2004 Voting Technology Will Not Be More Accurate Than Current Punch-Card Systems and May Under-Perform Them Given the Unique Nature of the Recall Election

Notwithstanding the strong conviction among many voting professionals that punch-card systems have a place in modern elections, the Secretary of State decided in 2001 to phase them out, but counties have until next March to replace them with other approved devices. Although dropping punch-cards, Los Angeles does not plan on purchasing and

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prompt voters to go back and "fix" an under-vote or over-vote. ER 168 (¶ 30); *see* 1 SER 33 (Herron ¶ 16) . That study corroborated a U.S. Civil Rights Commission study, which showed that central-count scanned ballots in Florida produced on average 50% more residual votes than punch-cards in the 2000 presidential election. 1 SER 32-33 (Herron ¶ 15).

[13] The 1996 and 2000 presidential races were very different: In 1996, we saw a presidential race with a sitting Democratic incumbent whereas 2000 was an open election expected to be very close nationwide. *Id*. 26 (Katz ¶ 24); *see id*. at 9 (Hawkins ¶ 14).

[14] Other than vaguely referring to some third analysis not disclosed in his initial declaration, Dr. Brady replied to these criticisms only by arguing that he proved his hypothesis of punch-card fallibility using two approaches, and both yield the same conclusion. ER 192 (¶ 15). But the fact that two flawed analyses yield the same mistaken answer hardly make it more likely that the answer is right.

deploying a new-technology system until sometime in 2005. For at least the March and November 2004 elections, Los Angeles intends to introduce an optical scan system using retooled punch-card machines that deposit ink on a card instead of punches. 1 SER 12-13 (Hawkins ¶ 21). The system shares many common attributes with the punch-card systems that plaintiffs' experts say contribute to their unreliability (*e.g.*, potential misalignment of the ballot card, voter's inability to check his or her work, etc.). *Id.* 13-14 (¶¶ 23 & 24). Los Angeles' new system has never been tested, other than for its mechanical integrity, and no performance data (including residual rates) exists because it has never been deployed in a real election anywhere. *Id.*13 (¶ 22)

Moreover, the card reader that Los Angeles intends to use, as well as those to be introduced in Sacramento when it, too, switches over from punch-cards next March, are stripped down versions that dispense with the feature—precinct-level scanning—that supposedly makes optical scanning more accurate.[15] 1 SER 14 (Hawkins ¶ 24). Plaintiffs' experts say that optical scanning systems contribute to an "accurate" tally because when ballots are scanned at the precinct level in the presence of the voter, under- and over-votes are caught, allowing the voter a "second chance" to fix his or her "mistake." ER 168 (Brady ¶ 30). But neither Los Angeles nor Sacramento will have precinct level scanning next March; ballots will be read at a central location long after the voter has left the polling place. 1 SER 14 (Hawkins ¶ 24).

[15] The three counties that intend to switch next March from punch-cards to DRE systems are not assured a lower residual rate. There is evidence that DREs do worse than punch-cards. 1 SER 15 (Hawkins ¶ 27).

The court below also had evidence that the unique nature of the recall election, which pits 135 candidates against one another for a single office, make it particularly suitable for punch-card voting (which can accommodate hundreds of candidates) and unsuitable for optical scan balloting (which cannot). Multiple-page ballots will be needed, but the optical card readers are not programmed to associate multiple pages as a single ballot. 1 SER 14-15 (Hawkins ¶¶ 25 & 26). Thus, a manual process, itself an invitation to error, must be devised to ensure that voters do not accidentally vote multiple times—a candidate on each page—simply because there are multiple pages. *Id*.

STANDARD OF REVIEW

A party requesting a preliminary injunction must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in its favor. *Hunt v. National Broadcasting Corp.*, 872 F.2d 289, 293 (9th Cir. 1989). Because the injunction normally gives plaintiffs all the relief they seek, their showing must not only be "clear and unequivocal," but "compelling." *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001).

"The denial of a preliminary injunction is subject to a limited standard of review." *Religious Tech. Center, Inc. v. Scott*, 869 F.2d 1306, 1309 (9th Cir. 1989). Because the grant or denial of motion for preliminary injunction relief lies "within the discretion of the district court," an order denying preliminary injunctive relief may be reversed only if the district court based its order on an erroneous legal premise or clearly

erroneous facts[16] or, considering all of the relevant facts, the district court made a "clear error of judgment." *Big Country Foods, Inc. v. Board of Educ. of Anchorage School Dist.*, 868 F.2d 1085, 1087 (9th Cir. 1989).

Consistent with *Hunt*, the district court denied plaintiffs' request for injunctive relief because it concluded that they were not likely to succeed on the merits and the balancing of equities weighed in favor of denying preliminary injunctive relief. Consequently, unless the district court made a clear error of judgment or based its decision on an incorrect legal standard or clearly erroneous findings of fact, the district court's decision must be affirmed. Absent these errors, the denial of preliminary injunctive relief cannot be reversed even if the reviewing court would have arrived at a different conclusion. As this Court has made clear, "whether or not we 'would have arrived at a different result if [we] had applied the law to the facts of the case' is irrelevant at this stage of the proceedings. In short, we do not decide whether the result reached by the district judge was correct." *California Pro-Life Council Political Action Comm. v. Scully*, 164 F.3d 1189, 1190 (9th Cir. 1999) (citations omitted).

Because plaintiffs asked a federal court to enjoin a state agency from discharging its constitutionally mandated duties, their evidentiary burden is higher than in typical injunction cases, and any reviewing court must be "more rigorous" in its review of the record before permitting such relief.

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[16] The district court's factual findings "are entitled to deference unless they are clearly erroneous." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). Thus, if the district court's "account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Phoenix Eng'g & Supply Inc. v. Universal Elec. Co.*, 104 F.3d 1137, 1141 (9th Cir. 1997). That standard applies even when the district court relied solely on a written record. *Phonetele, Inc. v. American Tel. & Tel. Co.*, 889 F.2d 224, 229 (9th Cir. 1989).

Thomas v. County of Los Angeles, 978 F.2d 504, 508 (9th Cir. 1992). *See also NAACP v. Town of East Haven*, 70 F.3d 219, 223 (2d Cir. 1995) (plaintiff's burden of proof is greater when it seeks federal court injunction to stay state governmental action).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion by denying plaintiffs' injunctive relief. The court properly concluded that because plaintiffs assert the same claims they previously prosecuted and settled in the *Common Cause* litigation, this action was likely barred by *res judicata*. It also properly concluded that plaintiffs had little probability of prevailing on the merits because: (1) the equal protection clause does not prohibit punch-card elections; and (2) plaintiffs have no evidence that punch-card voting results in racial discrimination actionable under the Voting Rights Act. Finally, the district court properly exercised its discretion in weighing the equities and determining that they tip decidedly in favor of allowing the recall election to proceed.

LEGAL DISCUSSION

I.
BECAUSE PLAINTIFFS ALLEGE THE SAME CLAIMS THEY ASSERTED IN *COMMON CAUSE V. JONES*, THEIR SUIT IS BARRED BY THE DOCTRINE OF RES JUDICATA

Plaintiffs pretend that the court below "did not base its denial of injunctive relief on [res judicata]." Pls.' Br. at 27. But of course it did. In the context of "determin[ing] the likelihood that plaintiffs will prevail on the merits of their lawsuit," Order at 6, the district court determined that "there is ample reason to believe that plaintiffs will have a difficult time overcoming [res judicata]." *Id*. at 11. Having presided over the case

giving rise to the *res judicata* bar, *Common Cause v. Jones*, the court was uniquely qualified to recognize the same claims being litigated again**.**

"A subsequent action may be barred under the doctrine of res judicata where (1) it involves the same 'claim' as an earlier suit, (2) the earlier suit has reached a final judgment on the merits, and (3) the earlier suit involves the same parties or their privies." ER at 203, *citing Nordhorn v. Ladish Co.*, 9 F.3d 1402, 1404 (9th Cir. 1993). Plaintiffs do not dispute that two of the three res judicata elements are satisfied, namely, that the *Common Cause* consent decree was a "final judgment on the merits" and that the two actions involve the same parties or their privies. Instead, plaintiffs contend that the claims are somehow different.

In this Circuit, four factors govern whether successive lawsuits involve a single cause of action: (1) whether the two suits involve infringement of the same right; (2) whether substantially the same evidence is presented in the two actions; (3) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Nordhorn*, 9 F.3d at 1405. As the district court correctly concluded, "[a]ll of these conditions are satisfied" here. ER at 204.

Plaintiffs do not address the first two factors because, obviously, they have nothing to say. The right at issue in the two cases is the same—the right under the U.S. Constitution and federal law to have one's vote counted fairly in a state election. *Compare* 2 SER 455 (¶ 1) ("This case is brought under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §1983, and Section 2 of the Voting Rights Act, 42 U.S.C. §1973") *with* 2 SER 473 (¶ 1) (identical statement). So too, the evidence is the same. Although the *Common Cause* Consent Decree

obviated the need for an evidentiary hearing, what plaintiffs would have been required to demonstrate is precisely what plaintiffs attempt to show here—the alleged fallibility of punch-card voting and the disparate treatment afforded similarly-situated Californians.

Nor do plaintiffs challenge the district court's finding that the rights established by the *Common Cause* judgment would be impaired—in the court's words, "eviscerated"—if this lawsuit were allowed to proceed. ER at 205. "Implicit in the Consent Decree and Judgment is an intervening period during which punch-card machines would remain certified for use." *Id*. Accordingly, the Secretary of State, and the County Registrars who rely on him to certify voting systems, had every reason to expect that until March 2004 they could use punch-card systems. The present action is at war with those reasonable expectations.

Plaintiffs' *res judicata* defense thus boils down to their disagreement with the district court's finding that the two actions arise from the same nucleus of operative fact. They contend the "factual nucleus" of this lawsuit, unlike the *Common Cause* action, is the recall election, and that this "fact" did not exist at the time of the earlier litigation. Pls.' Br. at 30. Plaintiffs are playing definitional games. Although each election is a politically unique event in that in it involves a particular set of issues, candidates and ballot measures, it does not follow that otherwise identical claims and factual allegations directed to the use of the same punch-card voting machines is a new "transaction" for *res judicata* purposes. Were plaintiffs correct in their construction of "factual nucleus," no case could ever be finally settled by a grant of prospective relief preceded by a grace period. By definition, since neither side could know with certainty what

circumstances might arise, any new event would constitute a new "factual nucleus" entitling the dissatisfied party to start litigating all over again.

The "factual nucleus" of this action, just as it was in *Common Cause*, is the use of punch-card voting systems in statewide elections. Plaintiffs complaint concedes as much. *See* 2 SER 455 (¶1 at 1:9-13) ("If the election proceeds on this date, voters in at least six counties . . . will use the same punch card voting machines challenged before this Court in *Common Cause, et al. v. Jones*").

Shorn of its rhetoric, plaintiffs' attempt to distinguish the two cases amounts to this: Whereas the *Common Cause* lawsuit challenged the use of the punch-card voting systems in all future statewide elections, here plaintiffs' challenge is limited to the upcoming October 2003 election.[17] But a party to a settled lawsuit is not entitled to another remedy later on. *See, e.g., Feminist Women's Health Center v. Roberts*, 63 F.3d 863, 868 (9th Cir. 1995) (Plaintiffs' subsequent action was barred by doctrine of res judicata because they were "merely seeking new remedies under a new legal theory."); *Restatement (Second) of Judgments*, § 25 comm. f.

Plaintiffs claim that they agreed to the *Common Cause* Consent Decree, and implicitly the State's use of "unconstitutional" voting machines until its effective date, because blocking the November 2002 election "would have left the state without a congressional delegation or executive branch" and because "there was no reason to believe that any statewide election would occur prior to" the Decree's effective date. Pls.'

[17] This point was not lost on the district court. *See* ER at 201 ("The plaintiffs in the *Common Cause* litigation levied their allegations not against the use of punch-card balloting in a particular election, but based upon the Secretary of State's certification of punch-card machines for use in all California elections.").

Br. at 30. The claim is irrelevant.[18] A party is not relieved of a *res judicata* bar arising from a consent decree settlement simply because circumstances later arise making the terms on which it settled less favorable than it appeared when the settlement was made.[19]

Moreover, the claim is untrue. Plaintiffs' knowingly assumed the risk, when they agreed to the stipulated disposition of *Common Cause*, that an important statewide election in addition to the November 2002 balloting might be conducted using punch-cards. When the parties signed the October 12, 2001 Stipulation that set the ground rules for a Consent Decree, Secretary Jones was prepared to decertify punch-card systems only by January 1, 2006 because meeting plaintiffs' target of March 2004 was impracticable. Accordingly, the parties agreed that their Consent Decree would become effective upon the date the district court determined was the earliest practical time to make the changeover from punch-card voting. 2 SER 501 (Stipulation ¶ 2). Ultimately, the district court determined that date to be March 1, 2004, but it could have fixed the date as late as

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[18] Plaintiffs' reliance on *Jones v. Bates*, 127 F.3d 839, 848 (9th Cir. 1977), is unavailing because the issue was whether plaintiffs in a later action were bound by the decision in an earlier action in which they were not parties.

[19] For this reason, the district court correctly concluded that, even if plaintiffs had properly sought a Rule 60(b) modification of the *Common Cause* decree and judgment (which they never did), such a motion likely would have been denied. ER at 206, n.2. Plaintiffs acknowledge that they considered but rejected seeking an injunction barring all further elections until punch-card machines had been replaced. Pls.' Br. at 30. They are therefore bound by that calculation because "the discretionary power granted under Rule 60(b) is not for the purpose of relieving a party from such 'free, calculated, and deliberate' choices made as part of a strategy of litigation." *Paul Revere Variable Annuity Ins. Co. v. Zang*, 248 F.3d 1, 6 (1st Cir. 2001), *quoting Ackerman v. United States*, 340 U.S. 193, 198, 71 S. Ct. 209, 95 L. Ed. 207 (1950). Where a party makes a considered choice, even if it involves some risk, he "cannot be relieved of such a choice because hindsight seems to indicate to him that his decision … was probably wrong…." *Ackerman*, 340 U.S. at 198.

January 1, 2006, and plaintiffs would have been bound by that date. Had the court done so, they would have had no complaint about nine California counties using punch-card systems to conduct both the March 2004 presidential primary and the 2004 presidential election. Having agreed to live with potential March and November 2004 constitutional deprivations, it is difficult to understand why an October 2003 gubernatorial recall, conducted pursuant to a century-old constitutional provision confronted by every governor since Ronald Reagan, constitutes the unacceptable surprise that plaintiffs claim.

II.
THE DISTRICT COURT DID NOT ERR IN FINDING THAT PLAINTIFFS HAD FAILED TO ESTABLISH A LIKELIHOOD OF PREVAILING ON THEIR CLAIMS

A. There Is No Merit To Plaintiffs' Equal Protection Claim.

Plaintiffs argue that the recall election should be enjoined because conducting it in October, as constitutionally required, will supposedly deprive those using punch-card ballots the "right to vote on equal terms" with all citizens. Pls.' Br. at 3. But plaintiffs failed to convince the district court of their essential premise—that punch-card systems fail to count more votes than newer systems. The district court's express decision not to find for plaintiffs on this factual controversy is reviewable only for clear error. *Big Country Foods, Inc.*, 868 F.2d at 1087. For the reasons discussed earlier, the evidence against punch-cards is, at best, dubious, and the district court did not commit error, clear or otherwise, in rejecting it.

But even if one assumes that punch-card systems lose one percentage point more votes than touch-screens or optical scan systems, as Dr. Brady professes, the district court properly rejected plaintiffs' equal protection claim. Plaintiffs seek to require a level of voting perfection that the

Constitution never has. Contrary to what plaintiffs suggest, courts do not rigidly apply the philosophical principles of equal protection in a vacuum. Rather, the Constitution aspires to reach electoral equality with real-world practicalities in mind, and with proper deference to the expertise and judgment of local election officials.

There is no question that county officials throughout California are diligently and honestly preparing for an October 7 election that will, to the greatest degree practicable, accurately and fairly discern the will of the people. Plaintiffs do not claim otherwise. Instead, they argue that because waiting until March 2004 might improve the accuracy of the state's voting systems when new—though, in some cases, untested—systems will be implemented, Californians should be prohibited from exercising their right to vote out the incumbent governor until that time. There is no constitutional right, however, to the "best" voting system, nor is the prospect of a "better" system in the future a valid reason to disenfranchise the electorate in the meantime. *See Hadley v. Jr. College Dist. Of Metro. Kansas*, 397 U.S. 50, 52, 90 S. Ct. 791, 25 L.Ed.2d 45 (1970). California has a valid and compelling interest in proceeding with the October 7 election as scheduled, particularly when Californians have in unprecedented numbers questioned the stewardship of their present governor.

1. The October 7 Election Does Not Violate the Equal Protection Clause.

No one disputes the constitutional ideal of "one person, one vote." The Constitution also recognizes, however, that what works in one election location may not work in another. The Supreme Court has consistently recognized the importance of allowing county officials flexibility in determining how best to serve their local needs in conducting their

respective elections. Thus, "states may employ diverse methods of voting, and the methods by which a voter casts his vote may vary throughout the state." *Hendon v. Bd. of Elections*, 710 F.2d 177, 181 (4th Cir. 1983). Given the need for flexibility, the "[m]athematical exactness or precision" that plaintiffs insist on is "hardly a workable constitutional requirement." *Reynolds*, 377 U.S. at 577; *see Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931) ("the machinery of government would not work if it were not allowed a little play in its joints").

Plaintiffs' argument that any deviation from equality must violate the Constitution misapprehends what the Constitution requires. While the Fourteenth Amendment speaks in terms of "one person, one vote," it requires only an "honest and good faith effort" by election officials to achieve "substantial equality," so that "as nearly as is practicable one man's vote … is to be worth as much as another's." *Reynolds*, 377 U.S. at 558-59 (emphasis added).[20] Plaintiffs' mistake, which is repeated on appeal, is their failure to distinguish between the constitutional ideal and what the Constitution requires while election administrators pursue it.

Black v. McGuffage, 209 F. Supp. 2d 889 (N.D. Ill. 2002), illustrates this distinction. Plaintiffs there claimed an equal protection violation because the Illinois election system was an "allegedly arbitrary system" that "unnecessarily values some votes over others." *Id.* at 899. Plaintiffs alleged that in the 2000 presidential election, the residual vote rate ranged

[20] Although plaintiffs complain that punch-card systems in California can potentially have residual rates of 1.5 percentage points more than other voting systems, plaintiffs never establish why such a variance is *per se* too much or would result in an unconstitutional election. In the apportionment context, courts have held that population inequalities as great as 10% are *de minimis* for equal protection purposes. *See Brown v. Thomson*, 462 U.S. 835, 842-43 (1983).

from 0.32% in some counties to over 36.73% in others. *Id.* at 893.[21] Denying a motion to dismiss, the *McGuffage* court held that plaintiffs could proceed with a claim requiring Illinois to improve its voting systems to address this disparity. The court never held, however, that counties in Illinois may not use different voting systems that produce different residual vote rates. In ruling on the motion to dismiss, not an application to enjoin an impending election, the district court was required to accept plaintiffs' allegation that the variance between 0.32% and 36.73% was "arbitrary," and, on the strength of that allegation, held that "significantly inaccurate systems" cannot be imposed "without any rational basis." *Id.* at 901. Nothing in *McGuffage*, which concerned prospective remedies to redress "arbitrary" voting variances, suggests that elections cannot be held while those improvements are implemented, or that the *Reynolds'* requirement of "substantial equality" is no longer the law.

The Supreme Court in *Bush v. Gore* did not hold otherwise. Contrary to what plaintiffs claim, the Supreme Court never ruled that the use of "punch-card voting machines in some counties, and far more accurate systems in other[s] denies equal protection." Pls.' Br. at 34. In fact, the Supreme Court upheld Florida's certified choice for President even though certain counties used a punch-card system with a 3.92% residual vote rate and other counties used "more modern optical-scan systems" with a 1.43% residual vote rate. 531 U.S. at 126 (Stevens, J., dissenting). In enjoining further recounts, the majority emphasized the need for a final election result by the statutory deadline, despite claims that

[21] Here, in contrast, plaintiffs complain that punch-card voting results in a residual vote rate of only 2.23% in the six counties that still use such systems.

more time might yield more "certainty as to the exact count." *Id.* at 121 (Rehnquist, C.J., concurring).

Despite their differences, all of the justices reaffirmed the right of localities to use different voting mechanisms, even though differing systems invite differing error rates. The per curium opinion faulted Florida for failing to provide any standard for what constitutes a legal vote, but expressly did not question "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* at 109. Justice Stevens, in dissent, recognized the established practice of states "to delegate to local authorities certain decisions with respect to voting systems." *Id.* at 126. Similarly, Justice Souter, in his dissent, agreed that "the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on." *Id.* at 134. If anything, then, the *Bush* decision supports the constitutionality of California's October 7 election plans.

2. The State of California Has a Legitimate and Compelling Interest To Proceed With the Recall Election on October 7 Using Punch-Card Systems

Plaintiffs urge this Court, in the name of equal protection, to second-guess the State's decision to proceed with the recall election on October 7, as required by the state constitution, because new voting systems will be unveiled in March 2004. Plaintiffs ask the Court to strictly scrutinize the October 7 date because the use of punch-card voting affects the right to vote. As the Supreme Court recognized in *Anderson v. Celebrezze*, 460 U.S. 780, 103 Sup. Ct. 1564, 75 L.Ed.2d 547 (1983), however, every

electoral regulation "inevitably affects—at least to some degree—the individual's right to vote," and strict scrutiny of every such regulation would unduly impair a state's ability to establish and administer orderly elections. *Id*. at 788. The district court correctly recognized that strict scrutiny should be limited to truly "severe" restrictions on the right to vote, and that "important regulatory interests are generally sufficient to justify … reasonable, nondiscriminatory restrictions" on that right. *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L.Ed.2d 245 (1992); *see also Reynolds*, 377 U.S. at 558 ("deviations from the equal-population principle are constitutionally permissible" if "based on legitimate considerations incident to the effectuation of a rational state policy").

The use of punch-card systems in Los Angeles and elsewhere is neither arbitrary nor irrational. While Dr. Brady may disagree, Registrars of voters from around the State have expressed confidence in the punch-card systems that voters and election personnel have used to elect every statewide official for the past forty-years (including the present Governor twice). Unlike Florida, California has long had uniform standards for manual punch-card recounts, and, as a result, there has not been a single California election where after a recount there remained an appreciable number of undecipherable "residual" punch-card ballots so as to call into question the outcome. 2 SER 8 (Hawkins ¶12).

Moreover, judgments of accuracy are only part of the equation in determining what particular voting machine works best for a particular county. As Registrar Hawkins explained below, new technologies have their own drawbacks. Optically scanned paper ballots do not avoid questions of voter intent, as the scanning machines can count as a vote an errant mark or fail to count an insufficiently distinct mark intended as a

vote; and only human judgment can deal with the ballot of the voter who circles a candidate's name rather than filling in the bubble. *Id.* at 9 (¶ 15). Touch-screens provide no audit trail for use during a recount, *id.* 10 (¶ 18), and they are so failure-prone that the highly-regarded Joint Caltech/MIT study concluded that "in terms of one very basic requirement—minimizing the number of lost votes—electronic voting does not have a very good track record." 2 SER 167.

Ultimately, like making many other technological choices, the selection of the right voting machine involves a host of competing considerations, so that, as Registrar Hawkins put it, "[t]here is no 'one size fits all,' nor is there any reason to banish any of the venerable technologies, including punch-cards." 1 SER 10 (¶ 18). Particularly, in large, language-diverse metropolitan counties, punch-cards can be the best choice. As noted earlier, one Presidential commission pointed to Los Angeles County as a place where because of "particular local needs," "punch cards make much more sense." *Id.* 303.

California has an important—indeed, compelling—interest in proceeding with the recall election on October 7, which unavoidably requires the use of punch-card systems. As noted earlier, the right of recall is premised on the fundamental right of the citizens to change leadership when, as here, a crisis of confidence regarding the state's highest elected official has arisen. Given this crisis, the "interest of the people in an expeditious recall procedure" is particularly urgent, lest the period of crisis be prolonged. *Janovich*, 592 P.2d at 1102 (emphasis added). This is why the California Constitution requires that the recall election be held within 60 to 80 days from the date the Secretary of State certifies the requisite level of signatures..

Plaintiffs argue that the State should disregard constitutionally mandated deadlines and wait until March 2004 to decide whether Governor Davis should be recalled. This is not simply a scheduling matter. Waiting disenfranchises all voters for the next seven months, stripping them of their recall right and potentially protecting the present Governor from the people's will. The State has a compelling interest in avoiding this outcome, and, as the district court explained, a March 2004 election is not an adequate substitute:

> Because an election reflects a unique moment in time, the Court is skeptical than an election held months after its scheduled date can in any sense be said to be the same election. In ordering the contemplated remedy, the Court would prevent all registered voters from participating in an election scheduled in accordance with the California Constitution.… Furthermore, the recall election in particular is an extraordinary—and in this case, unprecedented—exercise of public sentiment. Implicit in a recall election, and explicit in the time frame provided by the California Constitution, is a strong public interest in promptly determining whether a particular elected official should remain in office.

ER at 27.) *Accord Anderson*, 460 U.S. at 790 (the timing of an election matters because "the candidates and the issues simply do not remain static over time").

Regardless of one's view of whether the present Governor should remain in office, the State has a clear interest in promptly resolving that question. Prolonging the recall controversy for another six months risks "plunging the State into a constitutional crisis" as the State remains effectively leaderless. ER at 224. Because waiting is not an option when the people in historic numbers have lost faith in their leadership, the decision to permit millions of Californians to vote as scheduled is hardly "arbitrary and irrational." Pls.' Br. at 37.

B. The District Court Did Not Abuse Its Discretion in Determining that Plaintiffs Were Not Likely to Establish Section 2 Voting Rights Act Claim.

The district court also correctly determined that plaintiffs had failed to establish any likelihood of prevailing on a Section 2 Voting Rights Act claim, 42 U.S.C. § 1973. As this Court recently reaffirmed, a plaintiff pressing a Section 2 claim must demonstrate a "causal connection between the challenged voting practice and a prohibited discriminatory result." *Farrakhan v. Washington*, 338 F.3d 1009, 1018 (9th Cir. 2003) (*quoting Salt River Project*, 109 F.3d at 595). Plaintiffs argue that they have made such a showing because punch-card voting supposedly loses more minority votes than non-minority votes. There are wrong for two reasons.

1. A Disparate Impact, By Itself, Does Not Violate Section 2 Of The Voting Rights Act

In *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L.Ed.2d 25 (1986), the U.S. Supreme Court explained that the controlling question in a Section 2 case is "whether 'as a result of the challenged [voting] practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'" *Id.* at 44. Time after time, plaintiffs have challenged the disparate impacts of certain facially neutral voting procedures or practices; time after time, appellate courts—including the Ninth Circuit—have rejected such challenges as falling short of establishing a violation of the Voting Rights Act. While there is no requirement of a showing of discriminatory intent or animus since the 1982 amendments, without such a showing, "a bare statistical showing of disparate impact" on a minority

group is not enough to demonstrate the causal connection with racial discrimination that *Thornburg* requires. *Farrakhan*, 338 F.3d at 1018.[22]

Plaintiffs claim that "it is sufficient to show that a 'practice' or 'procedure' has the *effect* of disadvantaging minority voters." Pls.' Br. at 43 (emphasis in original). This is wrong. It is "well-settled" that a "showing of disproportionate racial impact alone does not establish a *per se* violation of the Voting Rights Act." *Wesley v. Collins*, 791 F.2d 1255, 1260-61 (6th Cir. 1986). *Accord Johnson v. Bush*, 214 F. Supp. 2d 1333, 1341 (S.D. Fla. 2002) ("no Section 2 violation occurs when factors other than race caused election results with a disparate impact on minorities"). Plaintiffs must prove that the disparate impact is "on account of race" rather than due to "other factors independent of race." *Farrakhan*, 338 F.3d at 1017-18. Plaintiffs' proposed rule contradicts every appellate court that has looked at the issue.

In *Salt River*, which *Farrakhan* analyzed in detail, plaintiffs challenged an agricultural district's land ownership voting qualification that had the effect of disadvantaging minority voters because a disproportionate percentage of the district's landowners were white. 109 F.3d at 588. There was disparate impact, but it was attributable to lower land ownership among minorities, which "did not reflect racial

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[22] Plaintiffs imply that *Roberts v. Wamser*, 679 F. Supp. 1513 (E.D. Mo. 1987), *rev'd. on other grounds*, 883 F.2d 617 (8th Cir. 1989), found punch-card voting systems problematic. Pls.' Br. at 41. In fact, *Roberts* held "It is not the use of the punch card voting system and automated tabulating equipment alone, but the Board's blanket failure to review rejected ballots, that resulted in the disenfranchisement of City voters." 679 F. Supp. at 1532. *Roberts* ordered a remedy of manual recounts and voter education. *Id.* at 1532-33. There is no such allegation in this case. Nor can there be: the Secretary of State has promulgated 44 pages for standards for uniform use to recount punch-card ballots; and there are extensive voter education programs underway for the use of punch-cards in connection with the recall. 1 SER 8 (Hawkins ¶ 12); ER 197 (Brady ¶ 27).

discrimination and so failed to satisfy the 'on account of race' requirement of the results test" of Section 2. *Id.* at 595-96. Plaintiffs do not try to distinguish *Salt River*.

In *Ortiz v. Philadelphia Office of City Comm'rs*, 28 F.3d 306, 310-16 (3d Cir. 1994), Pennsylvania's challenged voter purge law had the effect of disadvantaging minority voters, because minority voters had lower turnout than whites. But, again, plaintiffs could not show that lower turnout resulted from racial discrimination, so they failed to prove a causal connection on account of race required for a Section 2 violation. Plaintiffs do not try to distinguish *Ortiz*.

In *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986), Tennessee's felon disenfranchisement statute had the effect of disproportionately disadvantaging minority voters, but, again, because no showing was made linking higher minority felony conviction rates with racial discrimination, there was no causal connection on account of race. Thus, the disparate impact did not rise to a Section 2 violation. Plaintiffs do not try to distinguish *Wesley.*

Even in *Farrakhan*, where the Ninth Circuit found that the district court applied the wrong standard, there was no dispute that the felon-disenfranchisement statute had the effect of disadvantaging minority voters because felons were disproportionately from racial minorities. 338 F.3d at 1010. If plaintiffs were correct, and that simple effect were sufficient to show a Section 2 violation, *Farrakhan* would have instructed the district court to find a violation. Instead, the Ninth Circuit refused to reach the issue, and remanded for further proceedings. *Id.* at 1020. The *Farrakhan* plaintiffs were required to show that the reason that the felon disenfranchisement statute had a disparate impact was on account of race;

namely, that racial discrimination underlay the disproportionate composition of those caught up in the criminal justice system. *Id.* Merely noting the correlation was the start, not the end, of the inquiry.

But plaintiffs ask this Court to take an impermissible shortcut and find a violation, without any argument, without any causal mechanism, without any analysis of "social and historical conditions" to explain why punch-cards discriminate on account of race. Their claim largely reduces to the proposition that punch-cards undercount votes and that minority groups live in disproportionate numbers in the counties that use punch-cards. However, to establish that race causes the disparate impact they allege, plaintiffs needed to have shown that minority residency patterns in California counties result from racial discrimination, a burden then did not even undertake to carry below.

Alternatively, plaintiffs equate higher residual rates in predominantly minority voting precincts as evidence that these voters bear a greater risk of having their votes not count because of their race. But their basis is their expert's own *ipse dixit.* As we show in the next section, the bare statistical evidence does not establish any causal connection between the two nor rule out the myriad of other factors that are likely conjoined with race—wealth, educational level, voting experience, voter discontent—that might result in higher residual rates for minority precincts.

Moreover, even had plaintiff "linked" punch-cards and undercounted minority votes in the manner required by Section 2, the court below correctly dismissed their evidence of disparate impact as not constituting the "prohibited discriminatory result" that *Thornburg v. Gingles* requires. A disparate impact on account of race that does not limit the ability of minority voters to participate effectively as members of the electorate, or

that does not render office-holders comparatively less responsive to minority voters, is not a Section 2 violation. Thus, even if a practice has a dilutive effect, there is no violation "if other considerations show that the minority has an undiminished right to participate in the political process." *Johnson v. DeGrandy*, 512 U.S. 997, 1012 n. 10, 114 S. Ct. 2647, 129 L.Ed.2d 775 (1994) (*quoting Baird v. City of Indianapolis*, 976 F. 2d 357, 359 (7th Cir. 1992) (though election of four at-large members had racially discriminatory dilutive effect of minority voting bloc, other circumstances demonstrated that minorities were effective participants).

The district court correctly found that plaintiffs failed to prove this element, too:

> This is not a situation where, for instance, punch-card machines are alleged to be used only in minority-majority precincts, or where the error rate is so high as to consistently disable minority voters from electing their candidates of choice. Nor have Plaintiffs argued that historical discrimination or present animus, together with the lingering effects of prior discrimination, somehow combine to exacerbate the effect of this particular practice vis-à-vis minority voters. Nor do Plaintiffs even allege that punch-card machines are intended to limit, or have the effect of limiting, the ability of minority voters to participate effectively as members of the electorate, or have rendered office-holders comparative less responsive to minority voters.

ER at [22].

Plaintiffs had to prove both an effect on account of race and an effect that limits effective participation. They have proven neither in a state that has elected a minority lieutenant governor in 1998 and 2002 and a minority treasurer in 1994. The court was therefore amply justified in concluding that plaintiffs had failed to raise "substantial questions" as to a Voting Rights Act claim.

2. Plaintiffs Failed To Show That Punch-Card Systems Result in Disparate Impact By Losing More Minority Votes Than Non-Minority Votes

Plaintiffs' claim also fails for lack of credible evidence of its essential premise of disparate impact, *i.e.*, that punch-cards systematically lose more minority votes than non-minority votes. Dr. Brady, who says they do, claims that punch-cards have a higher residual rate than newer technology (2.23% versus .89%) and that minorities disproportionately reside in counties using punch-cards. But residual rates are not necessarily a measure of uncounted votes. As the district court observed, "It is possible … to conjure explanations other than machine error for a residual vote rate, including affirmative decisions by voters not to vote in particular races or on particular issues." ER at 210.

Researchers have moved beyond conjuring and have documented a significant degree of deliberate over-voting and under-voting—in Nevada, where it can be accurately measured because abstainers are given a box to mark, as high as 2% of voters in the last presidential election. 1 SER 22-23 (Herron ¶ 12). This is substantially the same as the California punch-card residual rate in the same election reported by Dr. Brady. And as discussed earlier, punch-card voting permits over- and under-voting while the newer systems discourage it, so one would expect higher residual rates in punch-card counties, and it would not imply greater machine error. Further, as Professor Herron discovered, African-American voters tend to abstain in greater numbers when an African-American is not on the ballot, as was the case in each of the elections Dr. Brady uses as examples. One would also expect this to be reflected in higher residual rates in minority-concentrated counties (which also happen to use punch-cards), and again it would not imply any greater punch-card error.

Moreover, even if one accepts the premise that residual ballots represent unintentionally "lost" votes, Dr. Brady's machine-type comparisons do not necessarily show that minorities are disadvantaged on account of race. Professor Katz explained that higher residual rates in punch-card counties may result from the fact that the selection of voting equipment is not random; the technology deployed in any county depends on the age, size, and education and income levels of its residents, and any of those non-race variables may be driving the residual rate, not the use of punch-cards. 1 SER 25 (¶¶ 19-21). At a minimum, plaintiffs' evidence does not make Dr. Brady's hypothesis of a race-based connection more likely than the alternative explanations.

Dr. Brady alternatively offers an analysis that correlates the percentage of minority members in a precinct with its residual rate, and from this he concludes that residents of heavily minority precincts are more likely to cast invalid ballots. Without reasoning, he then makes the impermissible logical leap that minority voters are more likely to cast invalid ballots on account of race.[23]

[23] The bald assertion by plaintiffs' expert that the disparate impact is "on account of race," as opposed to some third collinear variable "independent of race" that correlates with both race and uncounted punch-card vote rates is insufficient to prove the plaintiffs' case. *Cf. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1995) (expert testimony "is not a substitute" for facts) (antitrust); *Huey v. UPS*, 165 F.3d 1084, 1087 (7th Cir. 1999) (conclusory expert opinion does not create triable issue of fact) (Title VII). The most Dr. Brady shows through his single-variable regression is an allegation of disparate impact; the analysis does not show the causal connection except through assertion. A regression with only a single variable, such as Dr. Brady's, is "so incomplete as to be inadmissible." *Bazemore v. Friday*, 478 U.S. 385, 400 n. 10 (1986) (Brennan, J., concurring, joined by majority); *accord Rudebusch v. Hughes*, 313 F.3d 506, 527 (9th Cir. 2003) (Kleinfeld, J., concurring and dissenting); *Coward v. ADT Security Sys.*, 140 F.3d 271, 274 (D.C. Cir. 1998) (two-variable regression considering only race and seniority "incomplete" and cannot support Title VII claim).

Beyond the inexplicably racist implications of this thinking (why, all things being equal, should an African-American voter be more likely to make mistakes using a punch-card ballot than an Irish-American voter?), Dr. Brady's analysis suffers from a fundamental flaw. He infers from aggregate data what an individual voter might do without taking into account other "confounding" variables. For example, as Dr. Katz explains, minority precincts may also contain disaffected white voters in far greater numbers than non-minority precincts (or disenfranchised or less educated or poorer voters of any race), who view the ballot box as a form of protest and therefore cast invalid votes (or no votes) on purpose. 1 SER 28-29 (¶¶ 29 & 30). Inferring from aggregate data alone, as does Dr. Brady, would permit the inference that minorities have a higher residual rate when the residual rate is being driven by other factors. Dr. Brady could have controlled for this type of error, but apparently chose not to. *Id.* 29 (¶ 31).

While Dr. Brady might be willing to stake his professional reputation on it, the evidence supporting his view that punch-cards disproportionately undercount minority votes on account of race is at best tenuous and, in the words of the court below, "disputed." ER at 209. The district court was entitled to expect far more compelling evidence before derailing a state election of unprecedented importance, and so is this Court.

III.
THE DISTRICT COURT DID NOT ERR IN FINDING THAT THE BALANCE OF HARDSHIPS AND EQUITIES WEIGH AGAINST ENJOINING THE OCTOBER 7, 2003 ELECTION

A. Federal Courts Do Not Enjoin Even Routine Elections, Much Less Such Momentous Ones, Absent A Compelling and Overwhelming Showing.

Intervention "by the federal courts in state elections has always been a serious business," *Oden v. Brittain*, 396 U.S. 1210, 1211, 90 S. Ct. 4, 24

L.Ed.2d. 32 (1969), "fraught with difficulties" and "not lightly to be engaged in." *Chisom v. Roemer*, 853 F.2d 1186, 1189-90 (5th Cir. 1988). The "strong public interest in having elections go forward weighs heavily against an injunction that would delay an upcoming election." *Cardona v. Oakland Unified School Dist.*, 785 F. Supp. 837, 842 (N.D. Cal. 1992).

Indeed, the "well-established" rule is that courts will not block a scheduled election even if plaintiffs are likely to prevail. *Banks v. Bd. of Educ.*, 659 F. Supp. 394, 402 (C.D. Ill. 1987). The United States Supreme Court has repeatedly refused to disenfranchise the electorate by canceling an election, even when the plaintiffs had demonstrated a violation of the Constitution. *See Ely v. Klahr,* 403 U.S. 108, 113, 91 S. Ct. 1803, 29 L.Ed.2d. 352 (1971) (permitting election to proceed under unconstitutional plan to avoid elections that were "close at hand"); *Whitcomb v. Chavis*, 396 U.S. 1055, 90 S. Ct. 748, 24 L.Ed.2d. 757 (1970) (refusing to delay election under a scheme found to be unconstitutional); *Kilgarin v. Hill*, 386 U.S. 120, 121, 87 S. Ct. 820, 17 L.Ed.2d. 771 (1967) (affirming district court's decision to permit "constitutionally infirm" election to proceed). As the Court explained in *Reynolds*, courts must "consider the proximity of a forthcoming election" and exercise "proper judicial restraint." 377 U.S. at 585-86. "[T]he priority of holding elections on a timely basis warrants a temporary departure from the one-person, one-vote principle." *Watkins v. Mabus,* 771 F. Supp. 789, 804 (S.D. Miss. 1991). *See also Corder v. Kirksey*, 639 F.2d 1191, 1196 (5th Cir. 1981), *cert. denied*, 460 U.S. 1013 (1983) (affirming district court's decision to permit constitutionally questionable election to proceed given "impending" date).

Federal courts have similarly refused to enjoin scheduled elections for violations of Section 2 of the Voting Rights Act. *See Oden*, 396 U.S. at

1211 (1969) (refusing to enjoin election alleged to violate the Act); *Chisom*, 853 F.2d at 1189-90 (no injunction even assuming the election system to be illegal); *Gaona v. Anderson*, 989 F.2d 299, 303 (9th Cir. 1993) (deferring to district court's conclusion that enjoining upcoming election for alleged Section 2 violation was not in the public interest); *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1362-63 (M.D. Ala. 1986) (no injunction despite strong likelihood of Voting Rights Act violation); *Banks*, 659 F. Supp. at 400 (no injunction); *In re Penn. Congr. Dists. Reapp. Cases*, 535 F. Supp. 191, 194 (M.D. Pa. 1982) (denying injunction because impending election would be affected); *Cardona*, 785 F. Supp. at 842. These cases recognize that "the interests of the voters mandate holding elections on time." *Watkins*, 771 F. Supp. at 802-04.

To establish a contrary judicial power to enjoin elections, plaintiffs cite only cases that arose under section 5 of the Voting Rights Act. *See* Pls.' Br. at 55-56. As the district court recognized, however, section 5 cases involve unique considerations, and those cases do not support an injunction based on plaintiffs' alleged infirmities in the election process. *See* ER at 221, n.6. Section 5 mandates that a district court enjoin an election when changed voting procedures have not been pre-cleared by the Justice Department. *See, e.g., Clark v. Roemer*, 500 U.S. 646, 652-53, 111 S. Ct. 2096, 114 L.Ed.2d. 691.[24] The difference between this case and the section 5 cases is thus profound. As the Supreme Court noted in *Lopez v. Monterey County*, 519 U.S. 9, 23, 117 S. Ct. 340, 136 L.Ed.2d 273 (1996), section 5 limits a district court's role to determining whether section 5

[24] In *Clark*, the Court enjoined an election not scheduled until after the Attorney General had refused to pre-clear it. *Clark* did not address, nor purport to upset, the traditional "equitable principles" that justify allowing a scheduled election to proceed despite claims of illegality. *Id*. at 655-56.

covers a contested change in an election process and whether the change was pre-cleared. In terms of remedy, section 5 of the Voting Rights Act greatly limits a district court's ability to consider the balance the hardships or equities related to an injunction. Indeed, one of plaintiffs' cases held that equitable considerations are not to be considered in section 5 cases at all. *Haith v. Martin*, 618 F. Supp. 410, 414 (E.D.N.C. 1985).[25] This, of course, is not a section 5 case.

B. The District Court Committed No Abuse of Discretion in Concluding that the Equities, Including the Public Interest, Weighed Strongly Against an Injunction.

Where a requested injunction involves matters of public interest, the district court must give substantial consideration to that interest in deciding whether to grant or deny the request. *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1114 (9th Cir. 1999). Because disrupting the October 7 election unquestionably affects tens of millions of Californians, the district court would have committed reversible error had it granted plaintiffs' injunction without first concluding that the public would be best served by keeping Californians from voting on the recall for the next five months. *See Sammartano v First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002) (where the public interest is involved, a court may not

[25] Plaintiffs' quotation of *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 92 S. Ct. 1477, 32 L.Ed.2d 1 (1972) for the proposition that a federal court can delay an election if "constitutionally adequate" voting machines are not available, Pl. Br. at 54-55, is unjustified. There, the Court reversed a district court's improper redistricting. 406 U.S. at 199-201. It directed the lower court to act "promptly and forthwith" so that the state's electoral process could get under way "as soon as possible." *Id.* at 201. Buried in the last footnote is this passage: "If time presses too seriously, the District Court has the power appropriately to extend the time limitations imposed by state law," 406 U.S. at 201 n. 11. That dictum appears directed at candidate filing and residency deadlines that fell just weeks from when the Court issued its decision. It would be a stretch to argue that the Court intended to reverse its prior holdings against enjoining elections so offhandedly.

grant an injunction without expressly considering it); *Oakland Cannabis Buyers' Coop.*, 190 F.3d at 1114 (failure to separately consider the public interest constitutes reversible abuse of discretion).

Of course, the district court reached no such conclusion. Nor could it have. Plaintiffs' public interest showing amounted to a rhetorical appeal based on the importance of the right to vote. No one disputes that. But delaying or postponing an election also affects every voter's right to vote, along with other, substantial public policy issues. The court correctly found these to be key: "Delaying the election for half a year beyond the date set pursuant to the California Constitution undoubtedly works against the public interest implicit in a recall election." ER at 222. Among other reasons, the district court found that "allowing this election to go forward in October 'is essential to the state's political self-determination.'" *Id.* (*quoting*, *Cano*, 191 F. Supp. 2d at 1139). [26]

Plaintiffs nonetheless attack the district court for supposedly conducting only a "somewhat discursive" analysis of the public interests at stake in this case. (Pls.' Br. at 54.) To the contrary, the district court devoted nearly two hours of oral argument to those public interests before ultimately concluding that they weighed overwhelmingly against enjoining the October 7 election. Those interests are compelling.

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[26] On appeal, plaintiffs attempt to support their claim that the injunction serves the public interest by citing language from the district court's denial of the Secretary of State's post-judgment motion for reconsideration in *Common Cause*: "The Court finds it self-evident that replacing voting systems that deprive individuals of the right to vote is in the public interest." *See* 213 F. Supp. 2d at 1113. *See* Pls.' Br. at 53. That out of context quotation misses the point. Even if "replacing" punch-card voting systems were in the public interest, the issue here is whether it is in the public interest to refrain from conducting elections in the interim, especially elections required by the State Constitution to be held promptly to quell a crisis in state government. As shown above, an injunction would be hostile to those interests.

First, even if plaintiffs are correct in claiming that punch-card voting systems may fail to count approximately 40,000 votes, the district court correctly recognized that it would be far worse to guarantee that millions of California voters will be unable to vote at all on October 7. *See* ER at 224 ("Arguably, then, the Court by granting the relief sought could engender a far greater abridgment of the right to vote than it would by denying that relief."). As the court explained in *Banks*, enjoining a scheduled election has "the effect of preventing all of the voters … from exercising their right to vote and elect new" officials. 659 F. Supp. at 402.

Against this, the district court was required to weigh the bare possibility that some voters would not have their votes counted correctly, which could unfairly and irreversibly change the course of the election. But how large is the threat? According to plaintiffs' expert, among the 7.5 million votes expected to be cast, only 40,000—only some 0.5% of the total—can be expected to be punch-card residuals. Dr. Brady's testimony concedes that roughly half of these (1% out of his estimated 2.23% of residual punch-card ballots) will be deliberate abstentions, leaving perhaps 22,000 ballots that, for one reason or another, the tallying machines do not count as valid. Some portion of these would be captured in the manual recount that would follow any close outcome, leaving perhaps fewer than 20,000 ballots in question. Even if they all were intended to be voted the same way (unlikely), what are the chances that the recall will be decided by such a small margin (less than a quarter of one percent)?

Under these circumstances, "it is a better practice to go ahead with the election procedures already in place." *Banks*, 659 F. Supp. at 402. "If, after a trial on the merits, the Court decides that the election system" is invalid, "the Court can decide how to deal with the people who have been

elected to these offices at that time." *Id.*; *see also Oden*, 396 U.S. at 1211 (no basis for injunction when the "applicants could later bring suit to have [election] set aside"). Sorting things out later, if that proves necessary, is a small price to pay in order to enfranchise California's 7.5 million voters who have a fundamental right to vote on the recall.

Second, postponing the recall election until March 2004 would subject the People of California to an additional five months of rudderless leadership, precisely at a time when the need for leadership is most urgent. The problems facing California are grave, ranging from near insolvency of its treasury, to the flight of jobs and businesses, to a hopelessly broken workers' compensation system, to a stalemated legislature. Those problems can't be tabled for month after month while the Governor campaigns full-time to keep his job. Governor Walker drafted article 2, section 15(a) almost one hundred years ago to require that recalls be quickly decided so that the State Government could promptly be returned to the business of dealing with the State's problems. The district court wisely recognized this and the importance to all Californians of putting the recall behind us. *See* ER at 224.

Moreover, there is no guarantee that the State would remain in gubernatorial limbo for only an additional five months. Given that Los Angeles and some other punch-card counties will have only interim voting solutions in place by next March, and given that these may be even less reliable than the punch-card systems they will replace, nothing stops plaintiffs or any other party from seeking further delays until the State deploys voting systems that meet their view of what the Constitution requires.

Third, an injunction would, in effect, result in a judicially-installed interim chief executive officer. Plaintiffs' proposed five-month delay would cause "the electorate [to] have no say whatever as to the person to serve during that period." *Chisom*, 853 F.2d at 1192. That notion is offensive to the United States and California Constitutions, for it is neither proper nor fair to the voters for a court to "freez[e] current legislators in office." *Watkins*, 771 F. Supp. at 802-04; *see also Dillard*, 640 F. Supp. at 1363 (refusing to enjoin election because "extend[ing] the terms of incumbents" would "effectively deny the entire electorate the right to vote and thus seem to offend basic principles of representative government"); *Banks*, 659 F. Supp. at 402 ("if the Court were to enjoin the [] election, the Court would necessarily have to extend the terms of the present office holders until after a trial is held").[27]

Fourth, it cannot be in the public interest to protect an incumbent governor from having to face the voters because of a supposedly "malfunctioning" election system when his election was itself the product of that same system. As the court noted in *Banks* in refusing to enjoin an election, "the black voters of Peoria would be no better off because they would still be represented by the public officials currently in office, elected under the system they claim is illegal." 659 F. Supp. at 402. If plaintiffs are truly concerned about the illegitimacy of the voting system (and are not motivated by the political goal of preserving an incumbent they happen to

[27] Plaintiffs actually concede the point: "Plaintiffs' acknowledge that in an ordinary, regularly scheduled election, the state would have additional interests [beside the constitutional mandate that a recall election be held promptly] that would likely prove decisive – namely in having elected officials rather then empty government offices or judicially imposed holdovers." Pls.' Br. at 58. Their injunction would create just such a holdover. and the public interest against such an outcome is, as plaintiffs note, "decisive."

support), then keeping an incumbent in office who was elected by that same system serves no valid purpose.

Fifth, plaintiffs' requested injunction, which seeks to upset a scheduled election, would invite political mischief or, worse yet, the appearance of the same. Reasons can always be crafted to justify giving voters and election officials more time. The timing of an election will always favor one candidate over another. A court should always be wary of changing the timing prescribed by neutral election rules that were developed nearly a century before this controversy arose. For that reason, the district court was justifiably hesitant to interfere with normal election scheduling and, unwittingly, tip—or create in the public mind the appearance of tipping—a balance that only the voters should be able to influence: "Because an election reflects a unique moment in time, the Court is skeptical that an election held months after its scheduled date can in any sense be said to be the same election." ER at 224.

In light of these inequities and serious public interest concerns, the district court correctly refused the injunction, thereby ensuring the enfranchisement of 7.5 million Californians, giving force to the state constitutional command that recalls be promptly decided, facilitating the quick end of the leadership crisis that currently besets the State, and enabling Californians, led by a chief-executive of their choice, to move on and begin dealing with the State's many grave problems. Its decision, manifestly correct, should be left undisturbed.

IV.
CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision to deny plaintiffs' motion to enjoin the October 7, 2003 election.

Dated: September 4, 2003.

Respectfully submitted,

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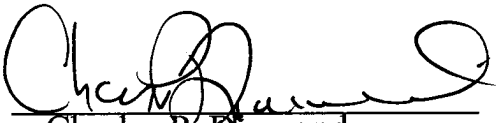
By 
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CERTIFICATE OF CIRCUIT RULE 32-1 COMPLIANCE

Pursuant to Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, uses a 14-point Times Roman typeface, and contains 13,892 words (not including the table of content, and table of citations).

Dated: September 4, 2003.

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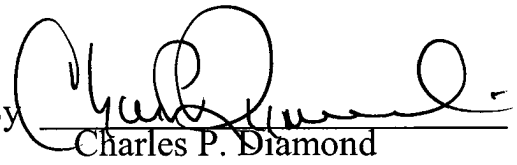
By 
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellee Ted Costa is not aware of any cases pending in this Court at this time that could be deemed "related cases" under the applicable rules.

Dated: September 4, 2003.

Respectfully submitted,

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PROOF OF SERVICE BY E-MAIL TRANSMISSION

I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 1999 Avenue of the Stars, Seventh Floor, Los Angeles, California 90067-6035. On September 4, 2003, I served the following:

ANSWERING BRIEF OF APPELLEE TED COSTA

by e-mailing a true and correct copy thereof together with an unsigned copy of this declaration to the following persons, at the following e-mail addresses:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 4, 2003, at Los Angeles, California.

Robert M. Schwartz

PROOF OF SERVICE BY FEDERAL EXPRESS/OVERNIGHT DELIVERY

I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 1999 Avenue of the Stars, Seventh Floor, Los Angeles, California 90067-6035. On September 4, 2003, I served the following:

ANSWERING BRIEF OF APPELLEE TED COSTA

by putting a true and correct copy thereof together with an unsigned copy of this declaration, in a sealed envelope, with delivery fees paid or provided for, for delivery the next business day to:

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and by placing the envelope for collection today by the overnight courier in accordance with the firm's ordinary business practices. I am readily familiar with this firm's practice for collection and processing of overnight courier correspondence. In the ordinary course of business, such correspondence collected from me would be processed on the same day, with fees thereon fully prepaid, and deposited that day in a box or other facility regularly maintained by Federal Express, which is an overnight carrier.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 4, 2003, at Los Angeles, California.

Julia M. Banks